No. 79-6574

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

KENNETH R. MATTHEWS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the ex post facto clause of the Constitution was violated by the retroactive application of new parole guidelines, which do not authorize his immediate release.

1. Petitioner was convicted in the United States District Court for the Western District of Pennsylvania of various charges relating to an attempted murder by bombing. He was sentenced to a total of 15 years' imprisonment with release on parole at such time as the parole board may determine, pursuant to 18 U.S.C. (1970 ed.) 4208(a)(2).[1/] The court of appeals affirmed (532 F.2d 748), and this Court denied certiorari. 426 U.S. 951 (1976).

1/ 18 U.S.C. (1970 ed.) 4208(a)(2) provided:

> (a) Upon entering a judgment of conviction, * * * (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may become eligible for parole at such time as the board may determine.

Petitioner filed a petition for writ of habeas corpus under 28 U.S.C. 2241, which was treated by the district court as a motion to vacate sentence under 28 U.S.C. 2255 (Pet. App. 4)[2/] He alleged that the guidelines used by the parole authorities in determining his expected release date had changed between the time he was sentenced on April 23, 1975, and the time he began serving his sentence on December 1, 1977. The result, petitioner claims, is that his release date has been postponed, frustrating the sentencing court's intention (Pet. App. 4). Petitioner also argued that his sentence had been amended by parole authorities from Section 4208(a)(2) parole eligibility to Section 4205(b)(2)[3/] parole eligibility. The district court, in denying petitioner's requested relief, noted that "[t]he Parole Commission and Reorganization Act, effective May 14, 1976, recodified §4208(a)(2) intact at 18 U.S.C.A. §4205(b)(2) (West Supp. 1977)." The court expressly found that its sentencing intention had not been thwarted by the new parole policies (Pet. App. 2). The court of appeals affirmed.

2/ Petitioner has filed several actions seeking collateral relief from his conviction (Matthews v. United States, No. 79-6390 (cert. denied June 2, 1980), and Matthews v. United States, No. 79-6579). He argues in those petitions that the government failed to produce exculpatory evidence and statements of witnesses; that the government failed to disclose all promises and rewards given to one of the government witnesses; that he was denied a speedy trial; and that the proof at trial failed to show any interstate commerce nexus for purposes of his federal explosives conviction under 18 U.S.C. 944.

3/ 18 U.S.C. 4205(b)(2) provides:

> (b) Upon entering a judgment of conviction, * * * (2) the court may fix the maximum sentence of imprisonment to be served in which event the court may specify that the prisoner may be released on parole at such time as the Commission may determine.

2. Petitioner contends that the application of the parole guidelines, which became effective after his sentencing, violates the ex post facto clause of the Constitution. He claims that the use of the new guidelines will result in a longer period of incarceration before he is released on parole. This claim was properly rejected by the courts below.

Petitioner was sentenced to 15 years' imprisonment with parole release at the parole board's discretion pursuant to 18 U.S.C. (1970 ed.) 4208(a)(2) (now 18 U.S.C. 4205(b)(2)). Sentencing under this section was construed as making prisoners eligible for early parole United States v. Wickham, No. 79-1101 (9th Cir., Dec. 18, 1979), slip op. at 1274. It did not, however, compel their early release.[4/] As this Court noted in United States v. Addonizio, 442 U.S. 178, 189 (1979) (footnote omitted):

> The authority of sentencing judges to select precise release dates is * * * narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission.

Since petitioner did in fact receive an early parole hearing on April 18, 1978 (Pet. 4), the Parole Commission fully recognized petitioner's early parole-eligibility status and acted in accordance with the law. The Commission's decision not to release petitioner at that time and its prediction of 55 months' incarceration before release were well within its discretion and did not conflict with the sentencing court's intention, as the district court held (Pet. App. 5). Moreover,

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4/ Section 4208(a)(2) was used by many courts, when long sentences were imposed, in order to make parole available in the event of totally unforeseen circumstances. Battle v. Norton, 365 F.Supp. 925, 932 (D. Conn. 1973). In fact, the great majority of prisoners sentenced under Section 4208(a)(2) were either released at a date beyond the one-third point in their sentence or at the expiration of their sentence. See Garafola v. Benson, 505 F.2d 1212, 1215 & n.3 (7th Cir. 1974).

the actual release dates of prisoners sentenced under Section 4208(a)(2) prior to the adoption of the new parole guidelines, clearly show that the application of the new guidelines in petitioner's case did not increase petitioner's punishment.[5/] Accordingly, in this situation where there has been no decrease in petitioner's parole eligibility, the application of the new parole guidelines does not offend the ex post facto clause of the Constitution. See United States v. Wickham, supra; cf. Geraghty v. United States Parole Commission, 579 F.2d 238, 266 (3d Cir. 1978), vacated on other grounds, No. 78-572 (March 19, 1980).

No conflict in the circuits remains concerning whether the new parole guidelines offend the ex post facto clause. On March 19, 1980, this Court decided United States Parole Commission v. Geraghty, No. 78-572, but did not reach the merits of the ex post facto claim, stating (slip op. at 19) that "[i]t would be inappropriate * * * to reach the merits of this controversy in the present posture of the case," and adding (id. at 20) that "although the court of appeals commented upon the merits for the sole purpose of avoiding waste of judicial resources, it did not reach a final conclusion on the validity of the guidelines. Rather, it held only that summary judgment was improper and remanded for further factual development. Given the interlocutory posture of the case before us, we must defer decision on the merits of [Geraghty's] case until after it is determined affirmatively that a class properly can be certified." Accordingly, the Court vacated the judgment and remanded to the court of appeals for further proceedings.

Inasmuch as the court of appeals' judgment in Geraghty has been vacated, there no longer exists a conflict among the circuits concerning whether application of the parole release guidelines to prisioners sentenced prior to the guidelines'

effective date violates the ex post facto clause. The courts of appeals uniformly agree that such application of the guidelines does not constitute an unconstitutional ex post facto enhancement of a criminal sentence. See Zeidman v. United States Parole Commission, 593 F.2d 806 (7th Cir. 1979); Rifai v. United States Parole Commission, 586 F.2d 695 (9th Cir. 1978); Shepard v. Taylor, 556 F.2d 648, 654 (2d Cir. 1977); Ruip v. United States, 555 F.2d 1331, 1335-1336 (6th Cir. 1977). For the reasons stated in our brief in Geraghty,[6/] we believe that this conclusion is correct. Therefore, we submit that in the absence of a conflict it is not necessary for this Court to consider the ex post facto claim asserted here.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

JULY 1980

6/ We are sending petitioner a copy of our brief in Geraghty.